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Jan. 2. 1880

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 140.

JEROME B. POLLARD, PLAINTIFF IN ERROR,

vs.

THE NEW JERSEY RAILROAD AND TRANSPORTATION COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED APRIL 28, 1877.



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INDEX.

	Original.	Print.
Writ of error	*a*	1
Return	*b*	1
Citation and service	1	2
Bond	2	2
Complaint	3	3
Demurrer	11	5
Replication	12	5
Order	13	6
Defendant's plea	15	6
Issue joined	25	9
Jury	25	9
Verdict	26	9
Judgment	26	9
Order	32	11
Issue joined	35	11
Replication	35	12
Demurrer	37	12
Rejoinder by defendant	42	13
Rejoinder by plaintiff	48	15
Order	51	16
Defendant's plea	52	16
Plaintiff's rejoinder	64	19
Order	65	20
Judgment	66	20
Clerk's certificate	67	20

a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States for the district of New Jersey, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Jerome B. Pollard, plaintiff, and The New Jersey Railroad and Transportation Company, defendant, a manifest error hath happened, to the great damage of the said Jerome B. Pollard, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the ninth day of January, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] S. D. OLIPHANT, *Clerk, &c.*

(Indorsed:) No. 29, M. T. 1874. U. S. circuit court district of New Jersey, 3d circuit. Jerome B. Pollard vs. The New Jersey Railroad & Transportation Company. Writ of error. Albert A. Abbott, att'y for pl'ff in error. Filed Jan'y 9, 1877. S. D. Oliphant, clerk.

I hereby allow the within writ.
Dated January 9th, 1877.

JNO. T. NIXON,
Judge of the District Court of the U. S. for the District of N. J.

b I, S. Duncan Oliphant, clerk of the circuit court of the United States for the district of New Jersey, by virtue of the foregoing writ of error, and in obedience thereto do hereby certify that the foregoing and following pages, numbered from 1 to 67 inclusive, contain a true and complete transcript of the record of judgment and proceedings had in said court in the case of Jerome B. Pollard, plaintiff in error, against The New Jersey Railroad and Transportation Company, defendants in error, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of said court to be hereunto affixed at the city of Trenton, in the district of New Jersey, on the second day of April, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and first.

[SEAL.] S. D. OLIPHANT,
Clerk of the U. S. Cir. Court Dist. of N. J.

1 The United States of America to The New Jersey Railroad and Transportation Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of New Jersey, wherein Jerome B. Pollard is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this ninth day of January, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] JNO. T. NIXON,
Judge of the District Court of the United States for the District of New Jersey.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

James T. F. Randolph, being duly sworn, on his oath says that on the twelfth day of January, 1877, at No. 126 Washington street, Jersey City, in the State of New Jersey, he delivered a true copy of the within citation to Isaac W. Scudder, esq., personally, and left the same with him.

Deponent further says that he knows the said Isaac W. Scudder to be one of the attorneys of record of the said defendant, The New Jersey Railroad and Transportation Company.

JAS. T. F. RANDOLPH.

Subscribed and sworn to before me this 6 day of Feb'y, 1877.

[SEAL.] JOHN A. SHIELDS,
U. S. Com'r, S. D. of N. Y.

(Indorsed:) U. S. circuit court district of New Jersey. Jerome B. Pollard ag'st The New Jersey Railroad & Transportation Co. Citation.

2 Know all men by these presents that we, John A. Titcomb, of Orange, in the State of New Jersey, and Charles A. Robbins, in said State, are held and firmly bound unto the New Jersey Railroad and Transportation Company in the sum of two hundred and fifty $\frac{00}{100}$ dollars, lawful money of the United States of America, to be paid to the said The New Jersey Railroad and Transportation Company, its certain attorney, successor, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, dated the ninth day of January, one thousand eight hundred and seventy-seven.

Whereas lately, at a circuit of the United States for the district of New Jersey, in a suit depending in said court between Jerome B. Pollard, plaintiff, and the New Jersey Railroad and Transportation Company, defendant, judgment was rendered against the said Jerome B. Pollard; and the said Jerome B. Pollard having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to

reverse the judgment in the aforesaid suit and a citation directed to the said The New Jersey Railroad and Transportation Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said Jerome B. Pollard shall prosecute his writ of error to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

(S'g) JOHN A. TITCOMB. [L. S.]
" C. A. ROBBINS. [L. S.]

Sealed and delivered in presence of—
(S'g) JAS. T. F. RANDOLPH.

(Endorsed:) No. 29, M. T., 1874. John A. Titcomb & Charles A. Robbins to the New Jersey Railroad & Trans. Co. Bond on writ of error. Dated Jan'y 9, 1877. The within bond is hereby approved. Dated Jan'y 9, 1877. (S'g) Jno. T. Nixon, J. Filed Jan'y 9, 1877. (S'g) S. D. Oliphant, clerk, &c.

3 Circuit court of the United States for the district of New Jersey. In the third circuit. Of the fifth day of October, in the year of our Lord one thousand eight hundred and seventy-four. District of New Jersey, ss.

JEROME B. POLLARD, PLAINTIFF,
vs.
THE NEW JERSEY RAILROAD AND TRANSPORTATION COMPANY, DEFENDANT.

Jerome B. Pollard, of Chicago, in the State of Illinois, and a citizen of said State, plaintiff in this suit, by Wesley Creveling, his attorney, complains of the New Jersey Railroad and Transportation Company, a body corporate by the act of the senate and general assembly of the State of New Jersey, defendant, of a plea that the said defendant render unto the said plaintiff the sum of twenty thousand dollars, lawful money of the United States of America, which the said defendant
4 to the said plaintiff owes, and from him unjustly detains.

For that whereas the said New Jersey Railroad and Transportation Company, at the times hereinafter mentioned, and long before, was, and ever since has been, a body corporate, duly established and organized under and by virtue of an act of the council and general assembly of the State of New Jersey, and during all of said time had and still has its offices and places of business in said State of New Jersey, and was and still is the owner of a certain railroad known as the New Jersey Railroad, with the track, cars, locomotives, and other appurtenances thereto belonging; and the defendant corporation, on the 30th day of June, 1871, and for a long time prior thereto, was a common carrier for hire of passengers upon and over its said railroad, and especially from the city of Philadelphia, in the State of Pennsylvania, to the city of Jersey City, in the State of New Jersey, aforesaid.

Thereupon, heretofore, to wit, on the 28th day of June, 1871, at Chicago, in the State of Illinois, to wit, at Trenton, in the State of
5 New Jersey, in consideration that the plaintiff at the special request of the defendant would then and there take and engage a place in the defendant's said cars for one Sarah H. Pollard, then long before and ever since the lawful wife of the plaintiff, to be conveyed as

a passenger therein, over the defendant's said railroad, from the city of Philadelphia, aforesaid, to the city of Jersey City, aforesaid, for a reasonable sum to be paid therefor by the plaintiff, the defendant undertook and promised the plaintiff to carry her, the said Sarah H. Pollard, in said cars, and on and over said railroad, from Philadelphia, aforesaid, to Jersey City, aforesaid, and to use due care and diligence in and about so carrying her as aforesaid.

And the plaintiff, confiding in the said promise of the defendant, did then and there engage for the said Sarah H. Pollard a passage in said cars, to be carried and conveyed therein by the defendant, on and over said railroad, to wit, from Philadelphia, aforesaid, to Jersey City,
6 aforesaid, and did then and there pay to the defendant a reasonable hire and reward, and the fare required by the defendant for the carriage and conveyance of said Sarah H. Pollard, as aforesaid.

And thereupon said Sarah H. Pollard did then and there take passage in the defendant's said cars, to be carried and conveyed as aforesaid, to wit, from Philadelphia, aforesaid, to Jersey City, aforesaid. Yet the defendant corporation, not regarding its said promise, did not use due and proper diligence in and about the carrying and conveying of the said Sarah H. Pollard, as the defendant had agreed and promised as aforesaid, to do, but, on the contrary, the defendant so carelessly, improperly, negligently and unskillfully provided, furnished, equipped, managed and conducted said cars and the locomotive by which the same were drawn over said railroad, that whilst the said cars were proceeding and being drawn by said locomotive from Philadelphia, aforesaid, to Jersey
7 City, aforesaid, to wit, at the city of Jersey City, and near the defendant's depot, and whilst the said Sarah H. Pollard was a passenger therein, as aforesaid, by and through the aforesaid carelessness, negligence, unskillfulness and misconduct of the defendant, the said cars were suddenly and violently jerked and started, and the said Sarah H. Pollard was then and there thrown down and greatly injured in her spine, and was hurt, bruised and wounded, and thereby became sick, sore, lame and disordered, and has so remained and continued thenceforward to the present time. And during all of said time, and by reason of the non-performance by the defendant of its said promise and undertakeing, and by reason of the aforesaid carelessness, negligence, unskillfulness and misconduct of the defendant, the said Sarah H. Pollard has suffered great pain both of body and mind, and during all of said time has been unable to perform her accustomed work and
8 duties, and unable to move from place to place without suffering great pain; and the said injuries, by her so sustained as aforesaid, are of a permanent character and are likely to last and to be endured by her for and during her natural life.

And by reason and in consequence of the aforesaid carelessness, negligence, unskillfulness and misconduct of the defendant in not performing its said promise and undertakeing as aforesaid, the plaintiff has been subjected to large expense for medicine and medical aid, attendance and services, and for nursing and other aid and assistance for his said wife, and he has devoted much time for the restoration and recovery of her usual health and strength, and he is likely to be subjected to similar expenditures dureing her natural life; and dureing all of said time, by reason of the aforesaid premises, he has been deprived of the labor and services of his said wife, and of her aid, assistance, care and superintendence, touching his household affairs, and the nurture and education of their child, and has also been deprived of the comfort and
9 society of his said wife, and has greatly suffered in mind and body

on account of the aforesaid condition of his wife, and of the said injuries, sustained by her as aforesaid, and he is likely to endure similar privation and suffering during their joint lives. All which is to the damage of the plaintiff twenty thousand dollars.

And the plaintiff further avers that the aforesaid undertakeing and promise of the defendant, and the said breach thereof by defendant, were fully established in a certain action in favor of said Jerome B. Pollard and his said wife against this defendant in this court, in which action judgment was rendered in said court at said Trenton on the 9th day of April, A. D. 1873, as by the record of said judgment will more fully appear; which judgment is still in full force and not annulled or reversed; and that the defendant is thereby estopped from again denying or contesting the making of said promise and undertaking, or the said breach thereof.

Yet the said defendant has not performed its said promise and undertaking, nor, though often requested, has the defendant paid said
10 sum of twenty thousand dollars or any part thereof to the plaintiff, but has hitherto whol'y neglected and refused and still does neglect and refuse so to do, to the damage of the said plaintiff the sum of twenty thousand dollars, wherefor' he brings this suit.

WESLEY CREVELING,
Attorney for Plaintiff.

11 And the said The New Jersey Railroad and Transportation Company, by Scudder & Vredenburgh, its attorneys, comes and defends the wrong and injury when, &c., and says that the said declaration and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law for the said Jerome B. Pollard to have or maintain his aforesaid action thereof against it, the said The New Jersey Railroad and Transportation Company, and that it, the said The New Jersey Railroad and Transportation Company, is not bound by the law of the land to answer the same, and this it is ready to verify.

Wherefore, for want of a sufficient declaration in this behalf, the said The New Jersey Railroad and Transportation Company pray judgment and that the said Jerome B. Pollard may be barred from having or maintaining his aforesaid action thereof against it, etc.

SCUDDER & VREDENBURGH,
Attorneys of Defendant.

12 STATE OF NEW JERSEY,
County of Hudson, ss:

Alfred L. Dennis, being by me duly sworn, on his oath says that the demurrer above pleaded by the said The New Jersey Railroad and Transportation Company is not intended for the purpose of delay, and that this affiant verily believes that the said defendant hath a just and legal defence to said action on the merits of the case.

A. L. DENNIS.

Subscribed and sworn to this twenty-fifth day of November, A. D. 1874, before me, at Jersey City, Hudson Co., New Jersey.

C. B. THURSTON,
M. C. C.

And the plaintiff saith that the said declaration and the matters therein contained in manner and form as the same are above stated

13 and set forth are sufficient in law for him, the said plaintiff, to have and maintain his aforesaid action thereof against the said defendants, and the said plaintiff is ready to verify and prove the same as the court here shall direct and award.

Wherefore, inasmuch as the said defendants have not answered the said declaration, nor hitherto in any manner denied the same, the said plaintiff prays judgment and his damages by reason of the not performing of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him, &c.

WESLEY CREVELING,
Attorney for Plaintiff.

At a term of the circuit court of the United States for the district of New Jersey, in the 3d circuit, held at Trenton, in said district, on Tuesday, the 28th day of September, A. D. 1875—present, Hon. William McKennan, Hon. John T. Nixon, judges—this cause coming on to be heard upon the defendant's demurrer to the plaintiff's declaration, and the issue joined thereon, after hearing Isaac W. Scudder and James B. Vredenburgh, esquires, in support of said demurrer, and Albert A. Ab-
14 bott, of counsel for plaintiff, in opposition thereto, and due deliberation being had, it is now ordered and adjudged, and the judgment of this court is, that the said demurrer of the defendant be and the same is hereby overruled.

It is further ordered that the following words contained in said declaration be and the same are hereby stricken out, that is to say: "And the plaintiff further avers that the aforesaid undertaking and promise of the defendant and the said breach thereof by defendant were fully established in a certain action in favor of said Jerome B. Pollard and his said wife against this defendant, in this court, in which action judgment was rendered in said court, at said Trenton, on the 9th day of April, A. D. 1873, as by the record of said judgment will more fully appear, which judgment is still in full force and not annulled or reversed, and that the defendant is thereby estopped from again denying or contesting the making of said promise and undertaking, or the said breach thereof."

15 It is further ordered that the defendant plead to the declaration as thus now amended within thirty days after the service of a copy of this judgment and notice, and upon failure of the defendant to plead as aforesaid, let the plaintiff have judgment.

Witness the Hon. John T. Nixon, judge, at Trenton, in said district, the 11th day of November, A. D. 1875.

And the said The New Jersey Railroad and Transportation Company, the defendant in this suit, by Scudder and Vredenburgh, its attorneys, comes and defends the wrong and injury when, &c., and says it did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against it. And of this it puts itself upon the country.

And for a further plea in this behalf the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says
16 that the said plaintiff ought not to have or maintain his action thereof against it, because it says that the said plaintiff, with Sarah H. Pollard, his wife, heretofore, to wit, on the ninth day of May, in the year of our Lord one thousand eight hundred and seventy-two, in this court, impleaded the said defendant in a certain plea of trespass on the case on promises, to the damage of the said plaintiff of twenty

thousand dollars, for the not performing the very same identical promises and undertakings in the said declaration mentioned, and such proceedings were thereupon had in the said court in that plea that afterwards, to wit, on the ninth day of April, in the year eighteen hundred and seventy-three, the said plaintiff, by the consideration and judgment of the said court, recovered in the said plea against the said defendant eight thousand one hundred & seventy-four dollars and
17 seventy cents for his damages which he had sustained, as well on occasion of the performing of the same identical promises and undertakings in the said declaration mentioned as for the costs and charges by him about his suit in that behalf expended, whereof the said defendant was convicted, as by the record and proceedings thereof still remaining in the said court more fully and at large appears, which said judgment still remains in full force and effect, not in the least reversed or made void. And this it, the said defendant, is ready to verify; wherefore it prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against it.

And for a further plea in this behalf the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the
18 said plaintiff ought not to have or maintain his action thereof against it, because it says that after the accruing of the said cause of action, and before this action, a certain other action was brought in this court by the said Jerome B. Pollard and Sarah H. Pollard, his wife, against the said defendant, in words as follows:

DISTRICT OF NEW JERSEY, *ss:*

Jerome B. Pollard and Sarah A. Pollard his wife, who are citizens of Illinois, plaintiffs in this suit, by Wesley Creveling, their attorney, complain of the New Jersey Railroad and Transportation Company, a body corporate by the act of the senate and general assembly of the State of New Jersey, defendants in this suit, of a plea that the said defendant render unto the said plaintiffs the sum of twenty thousand dollars, lawful money of the United States of America, which the said
19 defendant to the said plaintiff owes, and from them unjustly detains.

For that whereas the said New Jersey Railroad and Transportation Company, at the times hereinafter mentioned, and long before, was and ever since has been a body corporate, duly established and organized under and by virtue of an act of the council and general assembly of the State of New Jersey, and during all of said time had and still has its offices and places of business in said State of New Jersey, and was and still is the owner of a certain railroad known as "The New Jersey Railroad," with the track, cars, locomotives, and other appurtenances thereto belonging, and the defendant corporation on the 30th day of June, 1871, and for a long time prior thereto, was a common carrier for hire of passengers upon and over its said railroad, and especially from the city of Philadelphia, in the State of Pennsylvania, to the city of
20 Jersey City, in the State of New Jersey, aforesaid; thereupon, heretofore, to wit, on the 28th day of June, 1871, at Chicago, in the State of Illinois, to wit, at Trenton, in the State of New Jersey, in consideration that the plaintiff at the special request of the defendants would then and there take and engage a place in the defendants' said cars for the said Sarah H. Pollard to be conveyed as a passenger therein over the defendants' said railroad from the city of Philadelphia, aforesaid, to the city of Jersey City, aforesaid, for a reasonable sum to be

paid therefor by the said plaintiffs, the said defendant undertook and promised the plaintiffs to carry her, the said Sarah H. Pollard, in said cars and on and over said railroad from Philadelphia, aforesaid, to Jersey City, aforesaid, and to use due care and dil*l*igence in and about so carrying her as aforesaid.

And the said plaintiffs, confiding in the promise of the defend-
21 ants, did then and there engage for the said Sarah H. Pollard a passage in said cars to be carried and conveyed therein by the defendant on and over said rai road, to wit, from Philadelphia, aforesaid, to Jersey City, aforesaid, and did then and there pay to the defendant a reasonable hire and *and* reward, and the fare required by the defendant for the carriage and conveyance of the plaintiff, Sarah H. Pollard, as aforesaid.

And thereupon the plaintiff, Sarah H. Pollard, did then and there take passage in the defendants' said cars to be carried and conveyed as aforesaid, to wit, from Philadelphia, aforesaid, to Jersey City, aforesaid, and became and was such passenger to be carried and conveyed by the said defendant as aforesaid.

Yet the defendant corporation, not regarding its said promises, did not use due and proper diligence in and about the carrying and conveying of the said Sarah H. Pollard as the defendant had agreed
22 and promised as aforesaid to do, but, on the contrary, the defendant so carelessly, improperly, negligently & unskillfully provided, furnished and equipped, managed and conducted said cars and the locomotive by which the same were drawn over said railroad, that whilst the said cars were proceeding and being drawn by said locomotive from Philadelphia aforesaid to Jersey City aforesaid, to wit, at the city of Jersey City, near the defendant's depot, and whilst the said Sarah H. Pollard was a passenger therein as aforesaid, by and through the aforesaid carelessness, negligence, unskillfulness and misconduct of the defendant, the said cars were suddenly and violently jerked and started, and the said Sarah H. Pollard was then and there thrown down and greatly injured in her spine, and was hurt, bruised, and wounded, and
23 thereby became sick, sore, lame and disordered, and has so remained and continued thenceforward to the present time, and during all said time, and by reason of the non-performance by the defendant of its said promise and undertaking, and by reason of the aforesaid carelessness, negligence, unskillfulness and misconduct of the defendant, the said Sarah H. Pollard has suffered great pain both of body and mind, and during all of said time has been unable to perform her accustomed work and duties, and unable to move from place to place without suffering great pain, and the said injuries by her so sustained, as aforesaid are of a permanent character, and are likely to last and to be endured by her for and during her natural life; by reason and in consequence of the aforesaid carelessness, negligence, unskillfulness and misconduct of the defendant in not performing its said promise and undertaking as aforesaid, the plaintiffs have sustained damages
24 to the amount of twenty thousand dollars.

Yet the defendant has not performed its said promise and undertaking, nor, though often requested, has the defendant paid said sum of twenty thousand dollars or any part thereof to the plaintiffs, but to do this has hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of the said plaintiffs the sum of twenty thousand dollars, wherefore they bring this suit, &c.

WESLEY CREVELING,
Attorneys for Plaintiffs.

And the said defendants, by Isaac W. Scudder, their attorney, come and defend the wrong and injury when, &c., and say that they are not guilty of the said supposed grievances above laid to their charge or any or either of them in manner and form as the said plaintiffs have above thereof in their said declaration complained against them, and of
25 this the said defendants put themselves upon the country, &c.

J. W. SCUDDER,
Att'y for Defendants.

And the said plaintiffs as to the plea of the said defendants by them above pleaded and whereof they have put themselves upon the country do the like.

WESLEY CREVELING,
Att'y for Plaintiff.

Thereupon a jury being called came before the judges aforesaid on the seventh day of April, A. D. eighteen hundred and seventy-three, at Trenton aforesaid, which day before the judges aforesaid at Trenton aforesaid came the parties aforesaid by their respective attorneys aforesaid, and the jurors, being chosen and sworn, or affirmed, after hearing the parties aforesaid by their attorneys aforesaid and having received the charge of the court in this behalf, and having retired to consider their verdict, the jurors aforesaid did, on the ninth day of April, eighteen hundred
26 and seventy-three, return and in the presence of the court, being asked, they said they had agreed upon their verdict, and that their foreman should speak for them, and their foreman being asked said that they found for the plaintiffs aforesaid the sum of eight thousand (8,000) dollars, and so they all said upon their oaths and affirmations.

Thereupon it is considered that the said plaintiffs do recover against the said defendant the sum of eight thousand dollars for their damages aforesaid, and the further sum of one hundred and seventy-four dollars and seventy cents for their costs and charges by the court here adjudged to the said plaintiffs, which said damages, costs and charges amount in the aggregate to the sum of eight thousand one hundred and seventy-four dollars and seventy cents, and the said defendants in mercy, &c.

27 Judgment signed the ninth day of April in the year A. D. eighteen hundred and seventy-three.

JNO. T. NIXON,
District Judge.

Satisfaction of this judgment acknowledged this 29th day of May, A. D. 1875.

WESLEY CREVELING,
Att'y of Pltffs.

And the said defendant further avers that the judgment for the plaintiff was before this writ signed in the said action for the amount of damage and costs by the said plaintiff then recovered as aforesaid. That the promises and undertakings for the non-performance of which by this defendant the said plaintiff recovered said judgment as aforesaid were and are the same promises and undertakings as in the declaration in this action are above mentioned and set forth, and none other, which said judgment still remains in full force, not having been reversed, and this it, the said defendant, is ready to verify, where-
28 fore it prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against it.

And for a further plea in this behalf, by like leave of the court first had and obtained, according to the form of the statute made and provided, says that the said plaintiff ought not to have or maintain his action thereof against it, because it says that the said New Jersey Railroad and Transportation Company was not, at the time & in said declaration thereafter mentioned, nor at any time since, been a body corporate duly established and organized under and by virtue of an act of the council and general assembly of the State of New Jersey, and during all of said time, and still has its offices and places of business in said State of New Jersey, and was, and still is, the owner of a certain railroad known as "The New Jersey Railroad," with the tracks, cars, locomotives,
29 and other appurtenances thereto belonging, and that it is ready to verify. Wherefore, it prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against it.

SCUDDER & VREDENBURGH,
Attorneys.

STATE OF NEW JERSEY,
Hudson County, ss:

A. L. Dennis, being by me duly sworn, on his oath says that he was president of said corporation from about the year 1865 until it ceased to exist; that the summons in this suit was served upon him as such president; that the said plea above pleaded is not intended for the purpose of delay; and this affiant verily believes that the said defendant hath a just and legal defence to said action on the merits of the case.

A. L. DENNIS.

Sworn and subscribed before me at Jersey City this 9th day of December, 1875.

C. B. THURSTON,
Master in Chancery of New Jersey.

30 STATE OF NEW JERSEY,
Hudson County, ss:

A. L. Dennis, being by me duly sworn, on his oath says that he was president of said corporation from about the year 1865 until it ceased to exist; that the summons in this suit was served upon him as such president; that the said plea above pleaded is not intended for the purpose of delay; and this affiant verily believes that the said defendant hath a just and legal defence to said action on the merits of the case.

A. L. DENNIS.

Subscribed and sworn to before me at Jersey City, N. J., this sixth day of March, A. D. 1876.

GEO. W. CASSIDY,
Commissioner of the Circuit Court of the United States for the District of New Jersey.

31 To Messrs. SCUDDER & VREDENBURGH,
Defendants' Attorneys:

Please take notice that on the pleas of the defendant and on all the papers, pleadings, and proceedings herein I shall move before the Hon. John T. Nixon, judge, on the 28th day of December, 1875, at 11 o'clock in the forenoon, at the United States court room, in the State-house, at Trenton, New Jersey, to strike out each and all of the pleas of the above-named defendant, filed herein on the 10th day of December, 1875, as inconsistent and manifestly frivolous, irregular, and pleaded with a de-

sign to entrap or embarrass the plaintiff; and also on the ground that no affidavit such as is required by law was filed with said pleas, and that the same are a nullity; and also on the ground that said pleas firstly and fourthly pleaded are manifestly false; and also for judgment in favor of the plaintiff, and for such other and further relief as may be just.

Dated December 22, 1875.

WESLEY CREVELING,
Pl'ff' Att'y.

32 At a term of the circuit court of the United States for the district of New Jersey, held at Trenton, in said district, on the 7th day of March, 1876—present, Hon. John T. Nixon, judge—on reading and filing notice of motion to strike out the pleas of defendant heretofore filed herein, & for judgment, and after hearing Albert A. Abbott, esq., of counsel for plaintiff, in support of said motion, & James B. Vreedenburgh, esq., of counsel for defendant, in opposition thereto, it is ordered that said motion be & is hereby granted, and the said pleas be & the same are hereby stricken out, and let the plaintiff have judgment, unless the said defendant within five days from the service of a copy of this order on its attorneys shall file in the office of the clerk of the court the affidavit as drawn, verified by some officer authorized by law to take such affidavits.

And if such affidavit be filed within the time above described, & if the said defendant within the said time shall stipulate to accept a notice of five days for the argument at the next term of this court of any demurrer that may be interposed by the plaintiff herein, then & in that case said motion shall be denied without costs, & with leave to
33 the plaintiff, within five days after the filing of such affidavit and the service of a copy of the same on plaintiff's attorney, to reply or demur to said pleas, or any or either of them as he may be advised.

Dated March 11, 1876.

JNO. T. NIXON, *Judge.*

34 It is hereby stipulated that we will accept a notice of five days for the argument at the next term of this court of any demurrer that may be interposed by the plaintiff herein.

Dated March 13, '76.

SCUDDER & VREDENBURGH,
Att'ys of Def'ts.

35 And the said plaintiff as to the plea of the said defendant by it firstly above pleaded, and whereof the said defendant hath put itself upon the country, doth the like.

WESLEY CREVELING,
Plaintiff's Attorney.

And the said plaintiff, as to the said plea of the said defendant secondly above pleaded, says that notwithstanding anything therein alleged he ought not to be barred from having and maintaining his aforesaid action against the said defendant, because he says there is not any such record of such judgment remaining in said court in manner and form as the said defendant in its said plea secondly above pleaded has alleged, and this he is ready to verify.

Wherefore he prays judgment for his said damages and costs.

WESLEY CREVELING,
Plaintiff's Attorney.

And the said plaintiff as to the said plea of the said defend-
36 ant secondly above pleaded, by leave of the court for that purpose first had and obtained according to the form of the statute in such case made and provided, says that, notwithstanding anything in said plea alleged, he, the said plaintiff, ought not to be barred from having and maintaining his aforesaid action against the said defendant, because, he says, that he issued his writ herein and declared thereon, not for the cause of action in the said plea of the said defendant mentioned, and in respect whereof the said supposed judgment therein also mentioned was recovered, but for a cause of action other and different therefrom in manner and form, as the said plaintiff hath above thereof complained against the said defendant, and for which no judgment hath hitherto been recovered; and this he is ready to verify.

Wherefore, inasmuch as the said defendant hath not answered the said complaint of the said plaintiff as to the said breach and non-
37 performance of the said promises and undertakings in the said declaration mentioned and so newly above assigned as aforesaid, he, the said plaintiff, prays judgment and his damages by reason of the non-performance thereof to be adjudged to him, &c.

WESLEY CREVELING,
Plaintiff's Attorney.

And the said plaintiff as to the said plea of the said defendant by it thirdly above pleaded, says that the same and the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against the said defendant, and that he, the said plaintiff, is not bound by law to answer the same. And this he, the said plaintiff, is ready to verify.

Wherefore by reason of the insufficiency of the said plea in this behalf, the said plaintiff prays judgment and his damages by reason of the not performing of the said several promises and undertakeings in the said declaration mentioned, to be adjudged to him, &c.

WESLEY CREVELING,
Plaintiff's Attorney.

And the said plaintiff saith that the said defendant ought not to be admitted or received to plead the said plea by it fourthly above
38 pleaded, because he says that after the issuing and service of the writ herein, the said defendant caused its general appearance to be entered in this suit by its said attorneys, and thereafter the said defendant filed a demurrer to the aforesaid declaration of the plaintiff in the following words:

Circuit court of the United States for the district of New Jersey, in the third circuit.

THE NEW JERSEY RAILROAD AND TRANSPORTation Company
ads.
JEROME B. POLLARD.

39 And the said the New Jersey Railroad and Transportation Company, by Scudder & Vredenburgh, its attournies, comes and defends the wrong and injury, when, &c., and says that the said declaration, and the matters therein contained in manner and form as the same

are above stated and set forth are not sufficient in law for the said Jerome B. Pollard to have or maintain his aforesaid action thereof against it the said the New Jersey Railroad and Transportation Company, and that it, the said New Jersey Railroad and Transportation Company, is not bound by the law of the land to answer the same, and this it is ready to verify. Wherefore, for want of a sufficient declaration in this behalf the said the New Jersey Railroad and Transportation Company pray judgment, and that the said Jerome B. Pollard may be barred from having or maintaining his aforesaid action thereof against it, etc.

SCUDDER & VREDENBURGH,
Attorneys of Defendants.

40 As will appear by the record herein, and this he, the said plaintiff, is ready to verify; wherefore, he prays judgment, if the said defendant ought to be admitted or received against the said record to plead the plea by it fourthly above pleaded in this suit.

WESLEY CREVELING,
Plaintiff's Attorney.

And the said plaintiff, as to the said plea of the said defendant fourthly above pleaded, by leave of the court for that purpose first had and obtained, according to the form of the statute in such case made and provided, says that, notwithstanding anything therein alleged, he ought not to be barred from having and maintaining his aforesaid action against the said defendant, because in pursuance of an act of the senate and general assembly of the State of New Jersey, entitled "An act to incorporate the New Jersey Railroad and Transportation Company," passed on the seventh day
41 of March, 1832, the said defendant became, and at the time of the commencement of this action was, and still is, a body corporate, and this he is ready to verify.

Wherefore, he prays judgment for his said damages and costs.

WESLEY CREVELING,
Plaintiff's Attorney.

42 And the said defendant, as to the said replication of the said plaintiff by him above pleaded to the second plea of the said defendant, saith that he, the said plaintiff, by reason of anything by him in that replication alleged, ought not to have or maintain his aforesaid action thereof against it, because it saith that there is such a record of such judgment remaining in the said court in manner and form as it, the said defendant, in its said plea secondly above pleaded has alleged, and this it, the said defendant, is ready to verify by the said record, and it prays that the record aforesaid may be inspected and seen by the said court here.

And the said defendant saith, that the said further replication of the said plaintiff to the said second plea of the said defendant and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant,
43 and that it, the said defendant, is not bound by law to answer the same, and this the said defendant is ready to verify. Wherefore, by reason of the insufficiency of the said replication in this behalf the said defendant prays judgment, if the said plaintiff ought to have or maintain his aforesaid action against it, &c.

And the said defendant as to the said further replication of the said plaintiff to the second plea of the said defendant saith that the said

plaintiff ought not to be admitted or received to plead the said further replication to the second plea of the said defendant by him above pleaded, because it saith that the said plaintiff in his declaration filed by him in this cause, had declared that he issued his writ and declared thereon for the same cause of action in the said plea mentioned, in which declaration he declared as follows, to wit: "And the plaintiff further avers that the aforesaid undertaking and promise of the defendant and the said breach thereof by defendant were fully established in a
44 certain action in favor of the said Jerome B. Pollard and his said wife against this defendant in this court, in which action judgment was rendered in said court at said Trenton, on the ninth day of April, A. D. 1873, as by the record of said judgment will more fully appear, which judgment is still in full force and not annulled or reversed," as will appear by the record herein, and this it, the said defendant, is ready to verify. Wherefore it prays judgment if the said plaintiff ought to be admitted or received against the said record to plead the replication by him further pleaded to the second plea of the said defendant in this suit.

And the said defendant saith that its said plea by it thirdly above pleaded and the matters therein contained as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said plaintiff from having or maintaining his aforesaid action thereof against it, the said defendant, and the said defendant is ready to verify and prove the same when, where, and in such manner as the court
45 here shall direct and award. Wherefore, inasmuch as the said plaintiff hath not answered the said plea nor hitherto in any manner denied the same, the said defendant prays judgment and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against the said defendant, &c.

And the said defendant saith that the replication of the said plaintiff to the said fourth plea of the said defendant and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that it, the said defendant, is not bound by law to answer the same, and this the said defendant is ready to verify. Wherefore by reason of the insufficiency of the said replication in this behalf, the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against it, &c.

46 And the said defendant as to the said further replication of the said plaintiff to the fourth plea of the said defendant saith that the said plaintiff ought not, by reason of anything by him in that replication alleged, to have or maintain his aforesaid action thereof against it, the said defendant, because it saith that the said defendant by an act of the senate and general assembly of the State of New Jersey passed prior to the commencement of this suit and certificates filed in pursuance thereof prior to the commencement of this suit ceased prior to the commencement of this suit to exist as a separate corporation, and it was not at the time of the commencement of this action nor still is a body corporate, and this it is ready to verify. Wherefore it prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against the said defendant.

SCUDDER & VREDENBURGH,
Att'ys.

47 Please take notice that we shall move the court, before the Hon. John T. Nixon, judge, at the State-house in Trenton, on Tuesday, the 20th day of June, 1876, at 11 o'clock, a. m., or as soon thereafter as counsel can be heard, to strike out the rejoinder of the defendant to the further replication of the plaintiff to the fourth plea of the defendant as irregular, defective, and so framed as to prejudice, embarrass, and delay a fair trial of this action, and for such other and further relief as may be just.

Dated June 13th, 1876.

WESLEY CREVELING,
Att'y for Pl'ff.

To Messrs. SCUDDER & VREDENBURGH,
Att'ys for Def't.

48 And the plaintiff saith that the said further replication of the said plaintiff to the said second plea of the said defendant, and the matters therein contained in manner and form as the same are above stated and set forth, are sufficient in law for him the said plaintiff to have and maintain his aforesaid action thereof against the said defendant, and the said plaintiff is ready to verify and prove the same as the court here shall direct and award.

Wherefore, inasmuch as the said defendant hath not answered the said replication nor hitherto in any manner denied the same, the said plaintiff prays judgment and his damages by reason of the not performing of the said several promises and undertakings in the said declaration mentioned to be adjudged to him, &c.

WESLEY CREVELING,
Plaintiff's Attorney.

And the said plaintiff as to the said rejoinder of the said defendant to the said further replication of the said plaintiff to the second
49 plea of the said defendant, saith that the same and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him the said plaintiff from having or maintaining his aforesaid action thereof against the said defendant, and that he the said plaintiff is not bound by law to answer the same, and this he, the said plaintiff, is ready to verify.

Wherefore, by reason of the insufficiency of the said rejoinder in this behalf, the said plaintiff prays judgment and his damages by reason of the not performing of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him, &c.

WESLEY CREVELING,
Plaintiff's Attorney.

50 At a stated term of the circuit court of the United States for the district of New Jersey, held at Trenton, in said district, on 20th day of June, 1876. Present, Hon. John T. Nixon, judge.

JEROME B. POLLARD
vs.
THE NEW JERSEY RAILROAD AND TRANSPORTATION COMPANY.

On reading and filing notice of motion and proof of due service there-

of, a motion having been this day made to strike out the rejoinder of the defendant to the further replication of the plaintiff to the fourth plea of the defendant as irregular, defective, and so framed as to prejudice, embarrass, and delay a fair trial of this action, on motion of Wesley Creveling, esq., att'y for plaintiff, and after hearing Mr. A. A.
51 Abbott, of counsel for plaintiff, and Jas. B. Vredenburgh, esq., of counsel for defendant, it is ordered that said motion be and the same is hereby granted and said rejoinder is hereby stricken out.

It is further ordered that the declaration in this action and also the plaintiff's further replication to the fourth plea of the defendant be and the same are hereby amended by striking out the word "senate," wherever the same therein occurs, and inserting in place thereof the word "council."

It is further ordered that the defendant have leave to file a rejoinder to said replication within ten days from this date, setting up fully and particularly the statute and certificates referred to in the rejoinder, which, by this order, is stricken out.

52 Circuit court of the United States for the district of New Jersey.

THE NEW JERSEY RAILROAD & TRANSPORTATION Company
ads.
JEROME B. POLLARD.

And the said defendant, as to the further replication of the said plaintiff to the fourth plea of the said defendant, saith that the said plaintiff ought not, by reason of anything by him in that replication alleged, to have or maintain his aforesaid action thereof against it the said defendant, because it saith that the said defendant prior to the commencement of this suit ceased to exist as a separate corporation by virtue of the following act and certificate, that is to say, of an act of the senate & general assembly of the State of New Jersey, entitled "An act to amend an act entitled 'An act to validate and confirm cer-
53 tain agreements between the companies owning the railroad lines between New York and Philadelphia.'"

"1. Be it enacted by the senate and general assembly of the State of New Jersey, That whenever the joint board of directors of the corporations designated in said act as consolidated companies, to wit, The Delaware and Raritan Canal Company, The Camden and Amboy Railroad and Transportation Company, and The New Jersey Railroad and Transportation Company, shall, as provided in the said act hereby amended, have filed or caused to be filed the certificate in the second section of said act authorized or directed to be filed, the said three companies shall be and become one consolidated corporation, with the corporate name stated in such certificate, with the following named powers in addition to those in said last mentioned act conferred, to wit:
54 The consolidated corporation thus authorized to be formed shall be vested with and hold all the rights, titles, powers, franchises, privileges, property, immunity, and advantages heretofore conferred upon or now held by any or either of said three corporations respectively, and subject to all contracts, agreements, and engagements heretofore lawfully made by said corporations, or either of them, and the same shall pass to and become merged in said consolidated corporation; subject nevertheless to all the duties and obligations now existing upon or made by said three corporations; and said consolidated corporation

shall have like power to grant, convey, transfer, or assign, under or by using the name of such consolidated corporation, all the property held by either or all of the said three corporations as they or either of them now have; such conveyances or assignments, grants, transfers, or other instruments, to be executed by the proper officers or agents of said consolidated corporation as the board of directors thereof may from time to time regulate or direct; provided, that nothing in this act contained shall release either of the said companies from any duty, obligation, or contract imposed upon and now resting upon them under any of the laws of the State of New Jersey; and provided further, that nothing in this act contained shall in any wise affect or impair the rights of the State of New Jersey in reference to the said corporations or either of them, nor shall this State in consequence of the passage of this act be considered as waiving any right or rights which the State now has or may hereafter have in said corporations or either of them, nor be a waiver of the right of the State to take the said corporations or either of them, at the time and in the manner provided for in the charters of the said several corporations and the supplements thereto or either of them.

"2. And be it enacted, That the capital stock of said three corporations shall constitute and be the capital stock of said consolidated corporation; and the certificates of stock of the present existing three corporations shall be called in and cancelled, and a like amount of the stock of said consolidated corporation issued in lieu thereof; and each stockholder shall be entitled to as many votes at the meeting of the stockholders of the said consolidated corporation as he shall hold shares of stock; and the directors of said consolidated corporation shall be thirteen in number, one to be appointed by the legislature in joint meeting, and the other twelve as follows, to wit: four of the first directors shall be elected by the stockholders of the New Jersey Railroad and Transportation Company, four by the stockholders of the Delaware and Raritan Canal Company, and four by the stockholders of the Camden & Amboy Railroad & Transportation Company; after which the said twelve directors shall be elected annually, on the first Monday in May in each year, at a meeting of the stockholders of the consolidated corporation to be holden at Trenton, or such other time or place in the State of New Jersey as the directors may appoint, but a failure to elect on the day named shall not dissolve the corporation, but the directors may order the election to be held on a subsequent day; and all directors shall hold their office until others are chosen in their stead, and the said directors shall elect from their number a president, and may elect such other officers and make such by-laws as they deem necessary.

"3. And be it enacted, That this act shall not go into effect until accepted by the stockholders of each of said companies, at stockholders' meetings to be held for that purpose, at which the stockholders may vote in person or by proxy, and each stockholder shall be entitled to one vote for each share of stock held by him, and a majority of votes thus cast shall be necessary for such acceptance, and after the acceptance of this act, and the organization of the said consolidated corporation under the same, the said three companies shall cease to exist as separate corporations, provided that nothing in this act shall in any wise affect or interfere with any suit or suits, or proceedings of any kind now pending in any of the courts of this State to test the validity of the agreement, lease or leases entered into by the said corpora-

tions or any or either of them, with any railroad company or corporations.

"4. And be it enacted, That any provision in any act heretofore passed relative to said corporations or either of them, inconsistent herewith, is hereby repealed so far as the same is so inconsistent.

"5. And be it enacted, That this act shall take effect immediately.

"Approved March 14, 1872."

That said companys, by a certificate on the eighteenth day of May, A. D. eighteen hundred and seventy-two, filed with the secretary of the State of New Jersey, accepted said act in words as follows:

Certificate of organization and adoption of corporate name of "The United New Jersey Railroad & Canal Company."

Be it known to all whom it may concern that at a meeting of the joint board of directors of the Delaware & Raritan Canal Compay, the
60 Camden & Amboy Railroad & Transportation Company, and the New Jersey Railroad and Transportation Company, held at the office of the said companies, in the city of Trenton, State of New Jersey, on the twenty-sixth day of April, eighteen hundred and seventy-two, the following preamble and resolution was adopted by the said joint board:

Whereas it appears by the minutes of the meetings of the stockholders of the Delaware and Raritan Canal Company, the Camden and Amboy Railroad and Transportation Company, and the New Jersey Railroad & Transportation Company, that said companies have all consented to the consolidation of said companies into one company as provided and authorized by the act of the legislature of the State of New Jersey, entitled "An act to amend 'An act to validate and confirm
61 certain agreements between the companies owning the railroad lines between New York and Philadelphia,'" approved March 14th, 1872, and the act thereby amended, which consent was made by a majority of the stockholders of each of said companies voters at said meetings respectively: therefore,

Be it resolved by the joint board of directors of the said companies assembled, this twenty-sixth day of April, eighteen hundred and seventy-two, That the said three companies shall be and are hereby consolidated into one corporation, pursuant to and as provided by the said acts of the State of New Jersey, under the name of "The United New Jersey Railroad & Canal Company."

Now this certificate witnesseth, that the said joint board of directors have adopted the corporate name of The United New Jersey Railroad and Canal Company as the designation or name for said consolidated or united interest or corporation.

62 Witness the corporate seals of the said several consolidated companies, with the signature of their respective presidents and

secretaries, and that of the general president and secretary of said joint board.

[CORPORATE SEAL.] R. F. STOCKTON,
President of the Delaware & Raritan Canal Company.

Attest:
JOHN P. STOCKTON.

[CORPORATE SEAL.] WM. H. GATZMER,
President of Camden & Amboy Railroad and Transportation Company.

Attest:
SAMUEL J. BAYARD.
Secretary.

[CORPORATE SEAL.] A. L. DENNIS,
President New Jersey R. R. & Trans. Co.

FRED. W. RANKIN,
Sec'y N. J. R. R. & Trans. Co.

JOHN G. STEVENS.
Pres't of Joint Board.

WM. H. GATZMER,
Secretary of the Joint Board.

STATE OF NEW JERSEY:

I, Henry C. Kelsey, secretary of state of the State of New Jer-
63 sey, do hereby certify the foregoing to be a true copy of the certificate of organization and adoption of corporate name of "The United New Jersey Railroad and Canal Company," as taken from and compared with the original filed in my office the eighteenth day of May, A. D. 1872, now remaining on file & of record therein.

In testimony whereof I have hereunto set my hand and affixed my official seal this eighteenth day of May, A. D. 1872.

[SEAL.] HENRY C. KELSEY.

And so the said defendant says that it was not at the time of the commencement of this action, nor still is, a body corporate, and this it is ready to verify. Wherefore it prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against the said defendant.

SCUDDER & VREDENBURGH,
Att'ys for Def'ts.

64 And the said plaintiff, as to the said rejoinder of the said defendant to the further replication of the said plaintiff to the fourth plea of the said defendant, saith that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against the said defendant; and that he, the said plaintiff, is not bound by law to answer the same; and this he, the said plaintiff, is ready to verify.

Wherefore, by reason of the insufficiency of the said rejoinder in this behalf, the said plaintiff prays judgment and his damages by reason of the not performing of the said several promises and undertakings in the said declaration mentioned to be adjudged to him, &c.

WESLEY CREVELING,
Plaintiff's Attorney.

65 This cause coming to be heard on the first day of April, A. D. 1876, in the term of the court commencing on the first Tuesday of March, A. D. 1876, upon the plaintiff's demurrer to the third plea of the said defendant herein, and the issue joined thereon, and the argument of counsel thereon having been heard, and due deliberation being had thereon, and it appearing to the court here that the said plea above pleaded by the said defendant in manner and form aforesaid, and the matters therein contained, are sufficient in law to bar the said Jerome B. Pollard from having or maintaining his said action against the said The New Jersey Railroad and Transportation Company, therefore it is considered that the said Jerome B. Pollard take nothing by his said writ, but that he and his pledges to prosecute be in mercy, &c., and that the said The New Jersey Railroad and Transportation Company do go thereof without a day, &c.

And it is further considered by the said court that the said defendant do recover against the said plaintiff its costs and charges by it laid out about the defense of this action to be taxed.

JNO. T. NIXON, *J.*

66 At which day, before the judges aforesaid, at Trenton aforesaid, come as well the said Jerome B. Pollard as the said The New Jersey Railroad and Transportation Company, by their attorneys aforesaid; whereupon, all and singular, the premises being seen, and by the judges of our said court now here fully understood, and mature deliberation being thereupon had, it appears to the said court that the said plea of the said The New Jersey Railroad and Transportation Company by it above pleaded, and the matters therein contained, are sufficient in law to bar the said Jerome B. Pollard from having or maintaining his aforesaid action thereof against it the said The New Jersey Railroad and Transportation Company.

Therefore, it is considered that the said The New Jersey Railroad and Transportation Company do recover against the said Jerome B. Pollard the sum of eleven dollars and ten cents, for its costs and charges by it about its defence in this behalf laid out and expended by the court now here adjudged to the said The New Jersey Railroad and Transportation Company, and with its assent.

And the said Jerome B. Pollard, in mercy, &c.

Judgment signed this seventeenth day of November, in the year of our Lord eighteen hundred and seventy-six.

JNO. T. NIXON, *J.*

67 I, S. D. Oliphant, clerk of the United States circuit court, in and for the district of New Jersey, do hereby certify that the foregoing is a correct transcript of the final judgment of said entitled case as the same remains of record in the office of said court at Trenton in said district.

In witness whereof I have hereunto set my hand and affixed the official seal of said court this sixth day of January, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] S. D. OLIPHANT, *Clerk.*

(Indorsement on cover:) No. 140. Jerome B. Pollard, plaintiff in error, vs. The New Jersey Railroad and Transportation Company. New Jersey C. C. U. S. Filed 28th April, 1877.

Supreme Court of the United States.

JEROME B. POLLARD,
Plaintiff in Error,

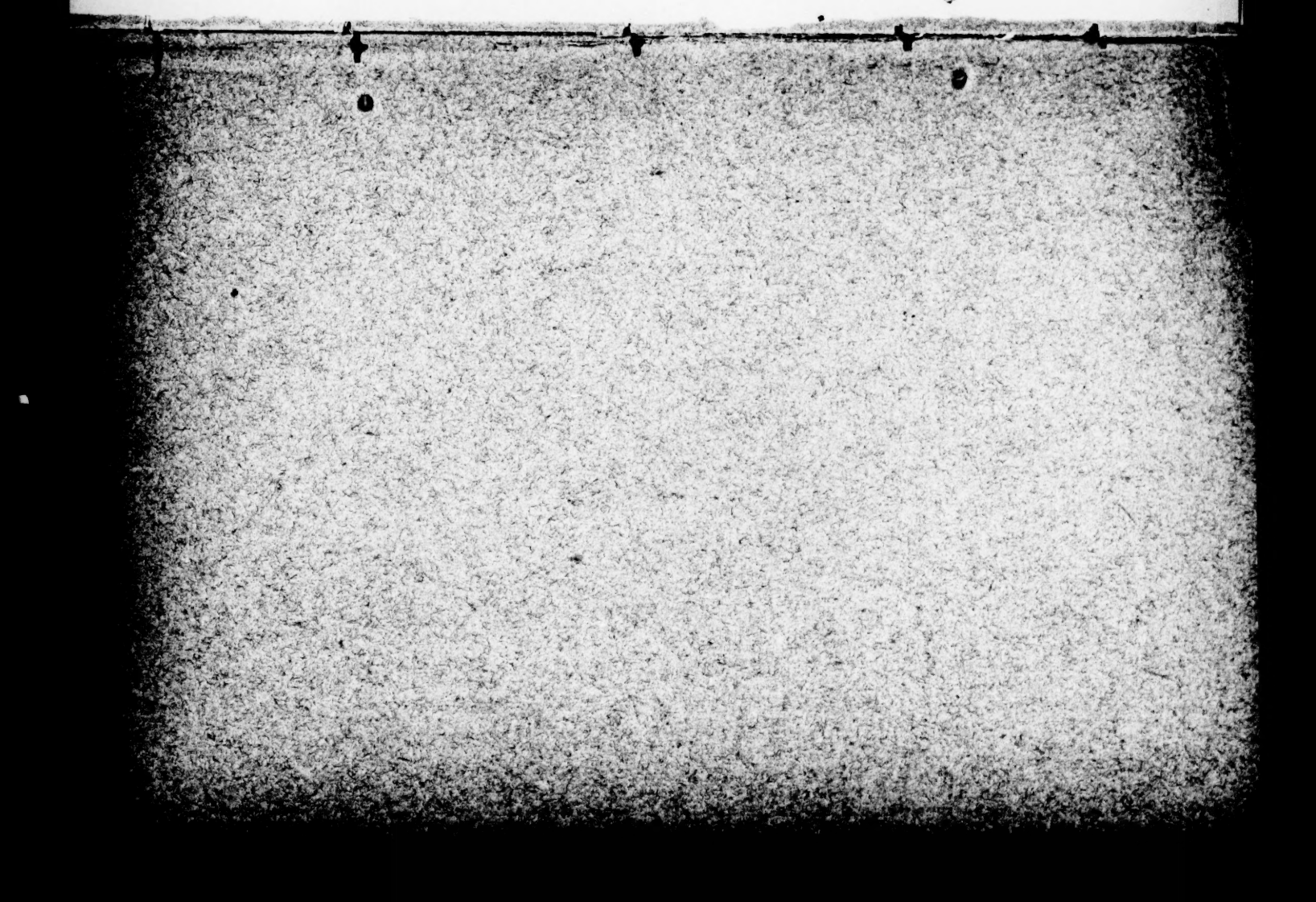
vs.

THE NEW JERSEY RAILROAD & TRANSPORTATION COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

ALBERT A. ABBOTT,
Counsel for Plaintiff in Error,
71 BROADWAY, N. Y. City.

New York:
JOHN POLHEMUS, PRINTER, 102 NASSAU ST.
1879.



Supreme Court of the United States.

JEROME B. POLLARD,
Plaintiff in error.

vs.

THE NEW JERSEY R. R. & T. Co.
Defendant in error.

Brief for Plaintiff in Error.

This case arises upon a writ of error to the United States Circuit Court, for the District of New Jersey, to review the judgment of said Court in favor of the defendant.

The action was brought to recover damages sustained by the plaintiff in consequence of an injury to his wife, Sarah H. Pollard, caused by the negligence of the defendant while she was a passenger upon the defendant's road.

The damages assigned are such, only, as were sustained by the husband, the present plaintiff, and embrace expenses to which he has been subjected for medical and other assistance and medicine for his wife, and for the loss of her assistance and society (Record, pp. 4, 5).

The defendant appeared and demurred to the declaration (Record, p. 5). The demurrer was overruled with leave to the defendant to plead over (p. 6).

The defendant thereupon filed the following :

No. 1. Plea of non-assumpsit (p. 6).
" 2. " " former recovery (pp. 6, 7).
" 3. " " former recovery (pp. 7, 8, 9).
" 4. " that defendant is not a body corporate &c. (p. 10).

Besides other subsequent proceedings, the plaintiff demurred to the 3d plea of defendant (p. 12), and the cause having been heard upon the issue thus joined, the said demurrer was overruled, and final judgment was entered thereupon in favor of the defendant.

The facts of the case are briefly these :

On the 28th of June, 1871, Sarah H. Pollard, the wife of the plaintiff, was a passenger upon the defendant's railroad on a journey from Chicago to New York, under a ticket therefor purchased of defendant by her husband, the present plaintiff. As she was about arriving at the end of her journey the car in which she was traveling, owing to the negligence of the defendant, was violently jerked or started, by reason of which she was thrown down and seriously injured in her spine, which injury has continued ever since, and is probably permanent.

An action was brought in the name of the present plaintiff and said Sarah H. Pollard against the defendant *to recover damages for the personal pain and suffering sustained by her* from said injury.

In this action judgment was recovered against the defendant, and affirmed by this Court (see Railroad Co. *v.* Pollard, 22 Wall, 341).

A copy of the record of said judgment is embraced in the third plea of the defendant.

Points.

I—A former recovery concludes the parties only as to the facts necessary to uphold it. It must ap-

pear that the claim was litigated in the former action, or that the party was bound to present and litigate it; it must be for matters legitimately within the issue and necessarily and directly passed upon by the jury. The same evidence must be sufficient to support both actions

Phillips *v*, Berick, 16 Johns., 137.
People *v*. Johnson, 38 N. Y., 65.
Barwell *v*. Knight, 51 Barb., 267.
Royce *v*. Burt, 42 Barb., 663.
Cowen & Hills, notes, 848.
Slauson *v*. Engelhart, 34 Barb., 202.
Kitchen *v*. Campbell, 3 Wil., 308.
Manny *v*. Harris, 2 Johns., 30.
Stowell *v*. Chamberlain, 60 N. Y., 272.
Douglass *v*. Ireland, 73 N. Y., 107.

II—The damages claimed by the present plaintiff were not claimed in the former action (compare the two declarations, Record, pp. 4 and 8), and they were not and could not have been recovered therein.

1 Chitty on Pl., 35 (16th Am. Ed.).
Lewis and *ux*. *v*. Babcock, 18 Johns., 443.
Russell and *ux*., *v*. Corne., 1 Salk., 119.
Holmes *v*. Wood, 2 Wils., 424.
Whitcomb *v*. Barre, 37 Vt., 148.
Kavanaugh *v*. Janesville, 24 Wis., 618.
Hooper *v*. Haskell, 56 Me., 251.

Note.—The Statute of New Jersey (Nixon's Dig., 4th Ed., p. 735) affords no exception to this point. It relates to actions *ex delicto* only. In this connection see Brockbank *v*. R. R. Co., 7 Hurl. & Nor., 834.

III—A former recovery is binding only upon parties or their privies, who have a mutual or successive relationship to the same right or thing.

The former recovery concludes the parties only in the character and as to the right in which they sue or are sued.

Bigelow on Estoppel, 2d Ed., p. 65.
Rathbone *v.* Hooney, 58 N. Y., 467.
Leggatts, Adm'x., *v.* R. R. Co., Law & Eq. Rep., Vol. 2, No. 18, p. 497.

IV—The present plaintiff was not a party to the former action in his own right, but in the right of his wife; and he was joined as a party to that action only because of that relationship.

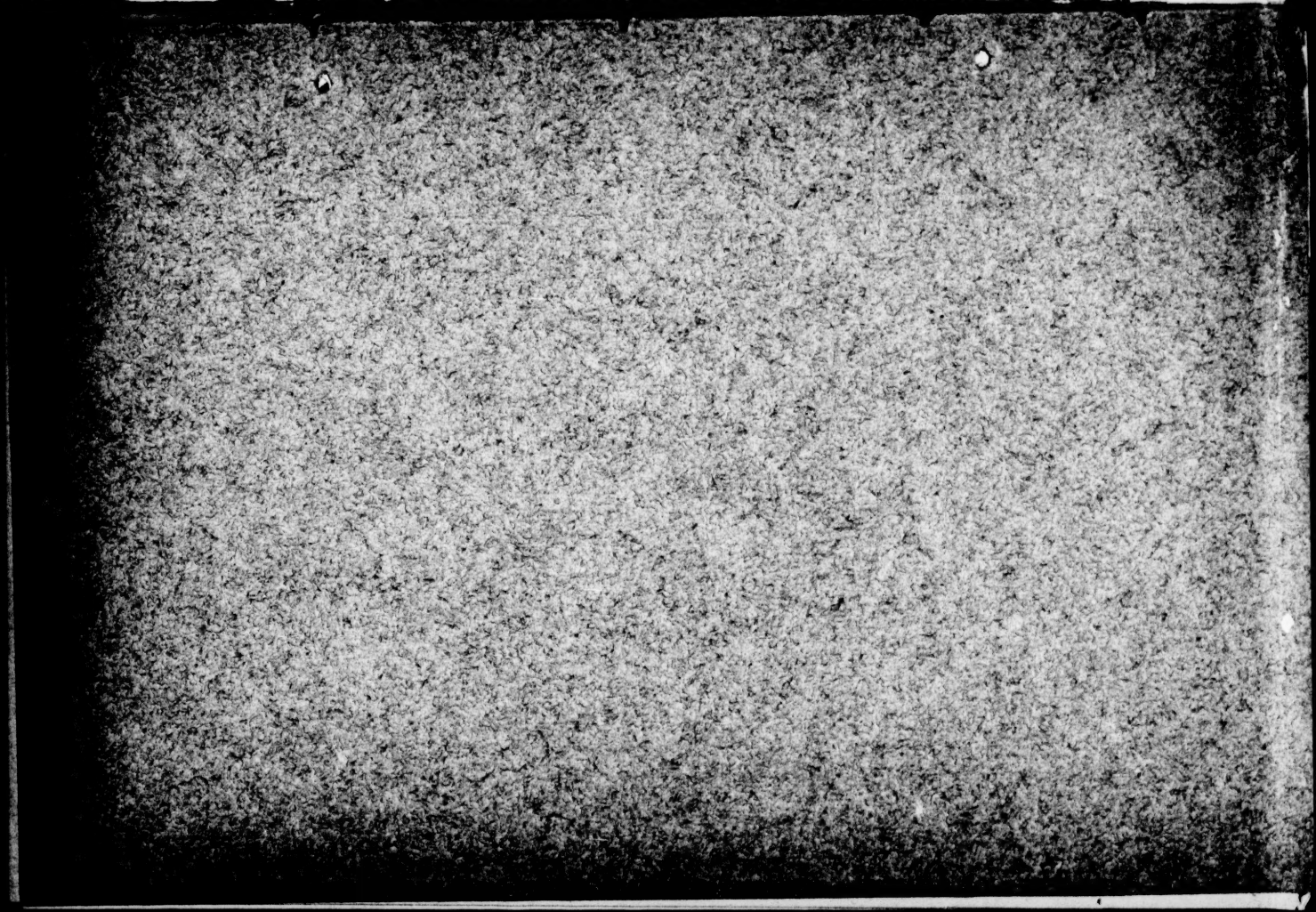
The plaintiffs in the former action had no joint right to recover for the damages which the present plaintiff alone sustained.

V—The form of action is proper and the declaration sufficient and defendants demurrer was properly overruled.

Saunders on Pl. and Ev., Vol. I., pp. 166–7.
1 Arch. Nisi Prius, 59.
Bank of Orange *v.* Brown, 3 Wend., 158.
Lockwood *v.* Bull, 1 Cowen, 322.
Bell *v.* Ward, 1 Dana (Ky.), 147.
Stoyel *v.* Westcott, 2 Day (Ct.), 422.
Vasse *v.* Smith, 6 Cranch, 226.
Brown's Law of Carriers, pp. 601, 474.
Yestore *v.* Wiswall, 16 How. Pr., p. 8.
Hammond on Parties, p. 6.
Warren *v.* Batchelder, 15 N. H., 129.
Fuller and *ux. v.* R. R. Co., 21 Ct., 556.

VI—The judgment of the Circuit Court should be reversed and the cause remanded, with directions to proceed.

ALBERT A. ABBOTT,
Counsel for Plaintiff in Error.



DAVISON & Co., Law Printers, 19 Montgomery st., Jersey City.

Supreme Court of the United States.

No. 140.

JEROME B. POLLARD,
Plaintiff in Error,
vs.
THE NEW JERSEY RAILROAD AND TRANSPORTATION COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

This case brings up a judgment for the defendants in error, on the third plea pleaded by the defendants, and demurred to by the plaintiff.

STATEMENT OF THE CASE.

Jerome B. Pollard and Sarah H. Pollard, his wife, on the 9th of May, 1872, brought an action of *assumpsit* in the Circuit Court of the United States for the District of New Jersey against The New Jersey Railroad and Transportation Company, a corporation of the State of New Jersey, as a common carrier of passengers, for an injury received by Sarah H. Pollard at Jersey City, New Jersey, on the 30th day of June, 1871.

The plaintiffs, Jerome B. Pollard and Sarah H. Pollard, in that suit on the 9th of April, 1873, recovered a judgment in assumpsit for a breach of contract against the defendants for $8,000 damages and $174.70 costs.

That judgment remains in force and was paid by the defendants to the plaintiffs.

The declaration in that suit is set out on page 7 of the record, folio 18.

It is a material element in that suit that it was an action of assumpsit.

It sets out that the defendants were common carriers for hire.

It averred that "in consideration that the plaintiff at the special request of the defendants would then and there take and engage a place in the defendants said cars for the said Sarah H. Pollard to be conveyed as a passenger therein, over the defendants said railroad from the city of Philadelphia aforesaid to the city of Jersey City aforesaid, for a reasonable sum to be paid therefor by the said plaintiffs, the said defendant *undertook and promised the plaintiffs* to carry her, the said Sarah H. Pollard, in said cars on and over said railroad from Philadelphia aforesaid to Jersey City aforesaid, and to use due care and diligence in and about so carrying her as aforesaid."

The declaration further avers that the plaintiffs "*confiding in the promise of the said defendant*," engaged the passage and paid the fare.

It also avers "that the defendant, not regarding *its said promises* did not use due and proper diligence," &c., whereby Sarah H. Pollard was injured.

To make a summary of the damages the declation charged "the said Sarah H. Pollard has suffered great pain, both of body and mind, and during all of said time has been unable to perform her accustomed work and duties, and unable to move from place to place without suffering great pain, and the said injuries by her so sustained as aforesaid are of a permanent character, and likely to last and be endured by her for and during her natural life; by reason and in consequence

of the aforesaid carelessness, negligence, unskillfulness and misconduct the plaintiffs have sustained damages to the amount of twenty thousand dollars."

Notwithstanding both Pollard and his wife claimed damages in that suit and obtained them, Pollard, alone, on the 5th of October, 1874, brought another suit for a breach of the same contract against the same defendants.

The declaration in the last suit is found on page 3 of the record, fol. 3.

This last suit is also assumpsit on a contract. The cause of the injuries and the injuries in the last suit are stated in the same words as in the first suit. The plaintiff in the last declaration being the present suit, on page 4, fol. 8, avers:

"And by reason and in consequence of the aforesaid carelessness, negligence, unskillfulness and misconduct of the defendant in not performing its said *promise and undertaking* as aforesaid, the plaintiff has been subjected to large expense for medicine and medical aid, attendance and services and for nursing and other aid and assistance for his said wife, and he has devoted much time for the restoration and recovery of her usual health and strength, and he is likely to be subjected to similar expenditures during her natural life; and during all of said time by reason of the aforesaid *premises* he has been deprived of the labor and services of his said wife, and of her aid and assistance, care and superintendance, touching his household affairs and the nurture and education of their child, and has also been deprived of the comfort and society of his said wife, and has greatly suffered in mind and body on account of the aforesaid condition of his wife and of the said injuries sustained by her as aforesaid, and he is likely to endure similar privation and suffering during their joint lives."

There is an averment of estoppel in the declaration, viz.:

"And the plaintiff further avers that the aforesaid undertaking and promise of the defendant and the said

breach thereof, by defendant, were fully established in a certain action in favor of said Jerome B. Pollard and his wife against the defendant in this Court, in which action judgment was rendered in said Court at Trenton on the 9th day of April, A. D. 1873, as by the record of said judgment will more fully appear; which judgment is still in full force and not annulled or reversed; and that the defendant is thereby estopped from again denying or contesting the making of said promise and undertaking, or the said breach thereof."

There are various pleas, replications and rejoinders contained in the record not necessary to notice, as no judgment was rendered thereon in the Circuit Court.

Judgment was rendered for the defendant in the Circuit Court on 3d plea, pleaded by defendant and demurred to by the plaintiff. See 3d plea, p. 7, fol. 17, down to bottom of p. 9.

On page 20, fol. 65, the record states, "This cause coming on to be heard on the first day of April, A. D. 1876, in the term of the Court commencing on the first Tuesday of March, A. D. 1876, upon the plaintiff's demurrer to the third plea of the said defendant herein, and the issue joined thereon, and the argument of counsel thereon having been heard, and due deliberation being had thereon, and it appearing to the Court here that the said plea above pleaded by the said defendant in manner and form aforesaid, and the matters therein contained are sufficient in law to bar the said Jerome B. Pollard from having or maintaining his said action against the said The New Jersey Rail Road & Transportation Company; therefore it is considered that the said Jerome B. Pollard take nothing by his writ," &c.

The third plea sets out a record of a judgment in assumpsit in a suit in the Circuit Court of the United States for the District of New Jersey, in which Jerome B. Pollard and Sarah H. Pollard were plaintiffs, and The New Jersey Railroad and Transportation Company were defendants. It sets out the contract for the transportation of Sarah H. Pollard and the breach of the contract, and the judgment thereon.

The plea then avers, "*That the promises and undertakings for the non-performance of which by this defendant the said* plaintiff recovered said judgment as aforesaid, *were and are the same promises and undertakings as in the declaration in this action* are above *mentioned and set forth and none other*," &c.

The demurrer admits this averment to be true.

I.

Both declarations are for a breach of the same contract. If the husband and wife resort to an action of assumpsit for a breach of a contract, and recover damages therefor, the husband cannot afterwards bring another action for the breach of the same contract, and recover for himself alone damages for the loss of services of his wife and medical aid.

The contract was entire. It was for the safe transportation of the wife on one journey. There was, and in the nature of the case could be, but one breach of this contract.

If the damages for the violation of the contract were divisible, then many actions could be brought.

The injury to the wife would be one ground of action. The loss of the services of the wife to the husband would have been another ground. Medical aid rendered by the husband would have been a third. To this might be added her inability to take care of her child.

The cases where the husband and wife bring an action for the injury the wife has sustained, and where the husband brings an action alone for the loss of the services of the wife, and also for medical aid, were always in tort. For the tort or wrong done to the wife, the husband and wife must join, because on the death of the husband the right of action would survive to the wife; and for the wrong done to the husband by the loss of the services of the wife, and for the expense of medical attendance, the husband could maintain his

action ex delicto, but not for a breach of the contract. In assumpsit the rule is otherwise.

Sedgwick on the Measure of Damages, M. p. 224, "It is an ancient rule of our law, that only one action can be maintained for the breach of an entire contract; and a judgment obtained by the plaintiff in any one suit may be pleaded in bar of any second proceeding."

Bendernagle vs. Cocks, 19 Wend. 207.
Rudder vs. Price, 1 H. Bla. 547.
Guernsey vs. Cowan, 8 Wend. 492.
2 Chitty on Contracts, 11th American Edition, p. 1172.

South and North Alabama Rail Road Co. vs. Henlein & Barr, 56 Alabama, 368. It is well settled that a single contract, unless it be payable in instalments, cannot be split up and become the foundation of a plurality of suits.

Oliver vs. Halt, 11 Alabama, R. 574.
O'Neil vs. Brown, 21 Alab. 482.
Bunnel vs. Pinto, 2 Conn. 431.

Actions ex delicto against common carriers are brought for the violation of a public duty. This action was brought for the violation of a private contract.

II.

The plaintiff demurs to the plea and thereby admits all the averments of the plea. The plaintiff admits "that the promises and undertakings for the non-performance of which by this defendant the said plaintiff recovered said judgment as aforesaid, were and are the same promises and undertakings as in the declaration in this action are above mentioned and set forth and none other," &c. The plea concludes with a verification.

If the plaintiff had other and further causes of action in the last suit, than such as were involved in the first

suit, then he should have replied and by replication set up such other and further causes of action that is to say, the loss of services by the husband.

The defendants insist that all these claims were in proof in the former suit.

3 Chitty's Plead. 956. Former recovery in debt, pleaded.

3 Chitty's Plead. 1157. Replication not any record, &c.

3 Wentworth's Pleadings 145. Plea of former recovery in assumpsit.

3 Wentworth's Plead. 146. Replication not any such record.

3 Wentworth's Pleading 150. Replication admitting the former judgment and replying, "that the said several promises and undertakings for which the said plaintiff impleaded the defendants and recovered damages as in the said record mentioned, were not," &c., "the same identical promises," &c., "but are other and different promises," &c., and the replication proceeds to set out the other and different promises, &c.

3 Chitty's Plead. 929. Plea of former recovery in assumpsit.

3 Chitty's Plead. 1157. Replication to plea of former recovery.

Bendernagle vs. Cocks. 19 Wendel, 215.

Brockbank vs. Whiteham Junction Railway Co., 7 Hurlstone & Norman, 834.

Whether any matter has been tried between the same parties and decided before is a fact depending in part on parol evidence and partly on the record.

Parker vs. Thompson, 3 Pick. 429, 433, 434.
Cist vs. Zeigler, 16 Serg. & Rawle, 282, 285.
Seddon vs. Tutop, 6 Durn. & East. 607.
2 Philip's Evidence, Cowen & Hill's Notes, p. 22.

Freeman on Judgments, sec. 273. Can go outside of the record and show by proof what was decided.

Campbell vs. Rolins, Sup. Court, U. S., October Term, 1878.

III.

The law is well settled, that in all cases where the husband alone brings an action for the loss of services of the wife, occasioned by a personal injury, the action is ex delicto, and not ex contractu.

Addison on Torts, 3d Edition, by Wolferstan, 918.
2 Hilliard on Torts, 500.
Buller's Nisi Prius, 78.
2 Chitty's Plead. 650.
Guy vs. Livesy, Croke, James, 501.
Brown vs. Gibbons, 1 Salkeld, 206.
Winsmore vs. Greenbank, Willes, 577.

1 Bacon's Abrid. 88, Action on the Case, F. "Of actions on the case for injuries to a man's person, property, right or privilege."

To prevent the bringing of two actions of tort Parliament in England has made provision, by the common law procedure act 1852, 15 and 16 Vict. c. 76, s. 40, "That in any action brought by a man and his wife for injury done to the wife in respect of which she is necessarily joined as co-plaintiff it shall be lawful for the husband to add thereto claims in his own right and separate actions brought in respect of such claims may be consolidated," &c.

A similar act exists in New Jersey, approved March 17, 1855, which read as follows :

Revision N. J. Laws, p. 851, sec. 22. "In an action by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right, arising ex delicto, and separate

actions brought in respect to such claims, may by order of the Court or Judge be consolidated."

Revision of New Jersey, p. 867. "The defendant at any time before issue joined, may move the Court to consolidate unnecessary actions."

This act does not include actions ex contractu, for the reason that such actions are always in tort.

Where the husband brings the action alone for the loss of the wife's services by reason of her injuries, it must be in tort; otherwise he could recover his damages for such loss of services in the action for the breach of the contract brought by the husband and wife. If the action be ex delicto, then the Court will look to the declaration, on demurrer to the plea, and pronounce the declaration bad, and give judgment on demurrer for the defendant.

The last suit makes a charge, that the plaintiff has been deprived of the services of the wife "in the nurture and education of their child."

This is not a ground for a separate action by the husband.

S. N. Sudder
of counsel with
in Error.

Davison & Co. Law Printers, 19 Montgomery st., Jersey City.

Supreme Court of the United States.

No. 140.

JEROME F. POLLARD,
Plaintiff in Error,

vs.

THE NEW JERSEY RAILROAD AND TRANSPORTATION COMPANY,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

The judgment before this Court for review is found on page 20, fol. 65.

It is upon a demurrer to the 3rd plea of defendant; the demurrer is found on page 12, fol. 37; the joinder by defendant, is found on page 14, fol. 45.

The subsequent pleadings found in the printed book were filed after the judgment to be reviewed.

This will appear from the date of the notice on page 15, fol. 47; the order fol. 50, and the judgment on page 20, fol. 65.

This demurrer admits the truth of all the facts in the 3rd plea which are well pleaded.

Chitty P. Vol. 1, p. 662, n. 1.
Coxe v. Gulick, 5 Hals. 328.

The third plea is found on page 7, fol. 18, and states a former judgment recovered, it is in the form as found in Chitty, vol. 3, p. 928.

Brokhart v. Whitestone Junct. R. R. Co.
7 Hurl v. Nor. Exc. p. 834.

It is therefore well pleaded.
Is it a defence to the action; this 3rd plea states:

1. That the former action was to recover unliquidated damages.

   It appears by the declaration in this suit that this action is to recover unliquidated damages, page 5.

2. That the promise and undertaking for the non-performance of which by this defendant, the said plaintiff recovered said judgment as aforesaid, was and is the same promise and undertaking in the declaration in this action mentioned and set forth and none other, and the same breach, page 9, fol. 28; and that the cause of action in this suit arose before the commencement of the former suit, page 7, fol. 18.

3. That it is the same plaintiff and same defendant in this suit as in the former.

4. They are in the same capacity; that is to say,

1. Identity in the thing sued for.
2. Identity of the cause of action.
3. Identity of persons.
4. Identity of the quality of the person for whom or against whom the claim is made.

2 Bour. Law Dict. 465, *Res judicata.*

As the demurrer admits the truth of these facts.
The judgment of the Court in favor of the defendant would seem to be fully supported by a long line of cases.

Duchess of Kingston's case; 2 Sin. Lead Ca. 573.
Howard v. Kimball, 65 Me. 308.
Davis v. Brown, 94 U. S. (4 Otto), 423.

If the Court should examine the pleadings in both suits, notwithstanding the demurrer admits the truth of the statement of the plea, of the identities above mentioned, to see if in point of fact those identities appear. It will find:

That the plaintiff by his declaration

1. Avers "that the aforesaid undertaking and promise of the defendant and the said breach thereof, by the defendant, was fully established by their action set up in said 3d plea of defendants. And said defendants further claim that because of this identity the defendant is estopped from again denying or contesting the making of said promise or undertaking the breach thereof."

   See printed case, p. 5, fol. 9.

2. The declarations in the two cases when compared show this assertion of the plaintiff to be true. p. 3 and p. 7.

Both are in assumpsit.

Both alleged an undertaking and promise on the part of the defendant made on January 28, 1871, to carry Sarah H. Pollard safely from Chicago to Jersey City.

Both allege a breach of this undertaking and promise by an injury to said Sarah near Jersey City, of precisely the same nature. Both have the same conclusions. In fact the declaration in the two suits are copies of each other, except that in the first suit the husband and wife are co-plaintiffs, and in the last the husband alone is plaintiff, and in the claim for damages.

Judgment upon the merits in a suit prosecuted in the name of the wife alone, to recover property belonging to her, is a bar to a second suit brought in the name of the husband and wife for the same subject matter.

Hawkins v. Lambert, 18 B. Mon. 99.

The joining of the wife with the husband in the first suit, did not prevent the husband from recovering all the injury he received or suffered by the breach of the contract.

The conclusion in each declaration is in these words:

"Yet the defendant has not performed its said promise and undertaking."

The promise and undertaking being the same in both cases, and the breach also being the same, the plaintiff must claim that he has not recovered all the damages he suffered by the said breach, and that for these damages he is entitled to bring another suit.

The damages alleged on the last suit are found on page 4, folio 8.

All the damages then alleged might have been, if they were not, included in the judgment in the first suit. The damages in the first suit were, that said Sarah A. Pollard became sick, sore, &c., and has been unable to perform her accustomed work, and that the injuries are permanent.

Upon this claim a jury gave the plaintiff $8000 for a breach of this contract.

If the amount of the verdict is considered, it would seem to indicate that the plaintiff had in that suit recovered every injury which he could possibly suffer or expect to suffer from the breach of the contract.

But even if they had been intentionally not included in said first judgment, the plaintiff would still be barred, and for the reason that the maxim here marked is not for the benefit of parties, but upon the theory of public

policy, that matters once litigated should not again be drawn in question between the same parties or their proxies.

Kilheffer v. Herr, 17 Say. & R. 319.
Crosby v. Jeroloman, 37 Ind. 264.

So therefore such a judgment is a bar not only as to every matter which was offered and received, but also as to any other admissible matter which might have been reasonably offered for that purpose.

Petersine v. Thomas, 28 Ohio St. 596.
Bates v. Spooner, 45 Ind. 489.
Cromwell v. County, 94 U. S. (4 Otto), 351.
Gould v. Evansville R. R. Co. U. S. 91 (1 Otto), 533, and numerous cases there cited.

When the cause of action is the same, a former judgment though inadequate is a bar.

Barney v. Barnes, 17 Conn. 420.

This rule seems to have especially applied in actions in assumpsit.

Foreman on Judgments, sec. 240, says: Where the action is upon a contract, it merges all amounts due under or arising out of the contract under the suit, they constitute a single indevisable demand. The plaintiff cannot be allowed the various covenants or promises contained in one contract, and to recover upon each separately. He can have but *one* recovery upon *one* contract.

Goodrich v. Yale, 97 Mass. 15.
Trask v. Hartford & N. H. R. R. Co., 2 Allen, 331.

This subject was learnedly and exhaustively discussed in Bendinagh v. Cocks, 19 Wendler, 207, and the result reached was that when a party has several demands or causes of action growing out of the same contract which may be joined and sued for in the same action, they must be so joined.

This decision was commented on and sustained.

O'Berne v. Lloyd, 43 N. Y. p. 248,
Hoff v. Meyer, 42 Barb. 270.
Smith v. Jones, 15 Johns. 229.

The claim under the second suit was clearly all due before the first suit was brought, and the presumption upon the face of the pleadings in that suit is, that they were included in the verdict in that suit.

It may be true that some of the damages claimed in the first suit could not be recovered in that form if objected to, but that fact did not prevent the plaintiff from recovering in the first suit the damages claimed in the second suit.

But whether the injuries which the wife received could have been recovered by her in first suit or not, it is clear that in that suit as brought, all the injuries resulting from the breach of the promise and undertaking alleged in both declarations could have been recovered.

James B. Vredenburgh
of counsel with defendant
in error.